Hasjuara (M) Sdn Bhd v Bio Science Capital Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP PETITION NO D-28–584 OF 2009
NALLINI PATHMANATHAN JC
2 OCTOBER 2009

Companies and Corporations — Winding up — Dissolution — Whether voluntary liquidation preferable to compulsory winding up by court — Whether special circumstances established — Whether voluntary winding up preferable for interests of general body of creditors — Company attempted to sell asset to repay bank facilities — Due diligence conducted by third party interested in purchasing company's asset — Receiver and manager appointed by bank in midst of due diligence — Whether sale by open tender by receiver and manager could severely affect price of company's asset — Whether court to allow application for leave to resolve for creditors' voluntary winding up — Companies Act 1965 s 276

Companies and Corporations — Winding up — Liquidators — Duties — Whether receiver and manager delinquent or negligent in conducting sale of company's assets — Whether receiver and manager cognisant of duty to realise company's asset at good price

Companies and Corporations — Winding up — Provisional liquidator — Petitioner's application to appoint provisional liquidator — Whether application premised bona fide on s 231 of the Companies Act 1965 — Petitioner to demonstrate assets of company in jeopardy or creditors will be ultimately disadvantaged — Whether balance of convenience favoured appointment of provisional liquidator

The business activity of the respondent was the construction, development and intended operation of a hospital ('the hospital'). The hospital was built with banking facilities procured from Affin Bank Bhd ('bank'). The petitioner was the main contractor for the construction and its claim of a debt owed by the respondent stemmed from work done by it. Due to the economic downturn there were difficulties in securing additional facilities. The applicant, which was the main shareholder of the respondent explored various options including the sale of the hospital to realise sufficient amounts to repay the bank and its general creditors. Sime Darby Healthcare ('Sime Darby') had indicating an interest in purchasing the hospital and issued a confidentiality

letter to the respondent to facilitate further due diligence. Sime Darby commenced their due diligence on the hospital but this was interrupted when the bank appointed a receiver and manager ('R & M') of the respondent company. The respondent informed the bank of Sime Darby's interest in acquiring the hospital and the disruption of their due diligence. The R & M nonetheless proceeded with an open tender exercise for the sale of the hospital to the highest bidder. The applicant therefore applied pursuant to s 276 of the Companies Act 1965 ('the Act') for leave to resolve for a creditors' voluntary winding up of the respondent company. Such an application was necessary as the petitioner had filed a petition to wind up the respondent. The applicant claimed that an open tender would severely affect the purchase price of the hospital. The petitioner objected to this application and in response filed an application to appoint a provisional liquidator of its own choice under s 255 of the Act.

Held, dismissing the applicant's and the petitioner's applications with costs:

(1) The onus was on the company to establish special circumstances showing that proceeding by way of a voluntary liquidation was preferable to a compulsory winding up by the court. It was incumbent on the applicant to demonstrate that a voluntary winding up would be preferable and to the interests of the general body of creditors, in comparison to a compulsory winding up by the court (see para 22).

(2) The R & M had progressed quite far in the course of their open tender for the sale of the hospital. The applicant produced no evidence to show that a sale by open tender could severely affect the purchase price of the hospital. Moreover, as the hospital was being sold by an open public tender, it was at all times open to Sime Darby to put in a bid (see paras 24–25).

(3) Simply because the R & M did not accede to the wishes of the main shareholder who was also a common director of the respondent, did not mean that the R & M was not cognisant of his duty to realise the hospital at a good price. There was no evidence that the R & M was delinquent or negligent in conducting the sale of the hospital (see para 26).

(4) The applicant had not met the test of showing that a voluntary winding up would serve the creditors better than a compulsory winding up by order of court. No special circumstances had been demonstrated warranting such an inference (see para 28).

(5) The petitioner's application to appoint a provisional liquidator was not premised bona fide on s 231 of the Act, but was filed with a view to ensuring that a provisional liquidator of the petitioner's choice, rather

than that of the applicant was appointed. The petitioner had not demonstrated that the assets of the company were in jeopardy or that the creditors of the company will be ultimately disadvantaged. Thus, there were no good grounds for this application. The balance of convenience did not favour the appointment of a provisional liquidator (see para 31).

[Bahasa Malaysia summary

Urusan perniagaan responden merupakan perniagaan pembinaan, pembangunan dan rancangan operasi hospital ('hospital'). Hospital tersebut dibina menerusi kemudahan perbankan daripada Affin Bank Bhd ('bank'). Pempetisyen merupakan kontraktor utama bagi pembinaan tersebut dan tuntutan hutang yang terakru daripada responden adalah berdasarkan kerja-kerja yang telah dilakukannya. Berikutan dengan kemelesetan ekonomi, terdapat kesulitan bagi mendapatkan kemudahan-kemudahan yang lain. Pemohon yang merupakan pemegang saham utama responden meninjau kaji beberapa pilihan termasuklah penjualan hospital tersebut bagi mendapatkan jumlah yang mencukupi untuk membayar bank dan pemiutang-pemiutang utamanya. Sime Darby Healthcare ('Sime Darby') telah menyatakan niatnya untuk membeli hospital tersebut dan mengeluarkan surat sulit kepada responden untuk memudahkan usaha wajar selanjutnya. Sime Darby telah memulakan usaha wajarnya ke atas hospital tersebut tetapi usaha tersebut terganggu apabila bank melantik seorang penerima dan pengurus ('P & P') bagi syarikat responden. Responden memaklumkan bank tentang minat Sime Darby untuk membeli hospital tersebut dan juga gangguan ke atas usaha wajar mereka. P & P walau bagaimanapun meneruskan dengan tawaran tender terbuka bagi jualan hospital tersebut kepada pembida yang tertinggi. Oleh itu pemohon memohon di bawah s 276 Akta Syarikat 1965 ('Akta') untuk keizinan bagi penyelesaian untuk penggulungan sukarela syarikat responden oleh pemiutang-pemiutang. Permohonan tersebut adalah perlu kerana pempetisyen telah memfailkan petisyen untuk menggulung responden. Pemohon mendakwa bahawa tawaran tender terbuka akan memberi kesan yang besar terhadap harga belian hospital tersebut. Pempetisyen membantah permohonan ini dan memfailkan suatu permohonan untuk melantik sendiri seorang likuidator sementara di bawah s 255 Akta.

Diputuskan, menolak kedua-dua permohonan pemohon dan pempetisyen dengan kos:

(1) Beban adalah pada syarikat tersebut untuk membuktikan keadaan-keadaan istimewa yang menunjukkan bahawa prosiding menerusi penyelesaian sukarela adalah lebih baik daripada

penggulungan wajib oleh mahkamah. Menjadi kewajipan pemohon untuk menunjukkan bahawa penggulungan sukarela adalah lebih baik dan untuk kepentingan pemiutang-pemiutang, berbanding dengan penggulungan wajib oleh mahkamah (lihat perenggan 22).

(2) Usaha-usaha P & P telah berkembang jauh dalam urusan tender terbuka bagi penjualan hospital tersebut. Pemohon tidak mengemukakan sebarang keterangan yang menunjukkan bahawa jualan menerusi tender terbuka akan memberi kesan yang besar ke atas harga pembelian hospital tersebut. Lagi pula, hospital tersebut dijual menerusi tender awam terbuka, maka Sime Darby berpeluang menawarkan bidaannya (lihat perenggan 24–25).

(3) Hanya disebabkan P & P tidak menurut kehendak pemegang saham utama yang juga merupakan pengarah umum responden, tidak bermakna P & P tersebut tidak mengetahui tugasannya untuk menjual hospital tersebut dengan harga yang bagus. Tiada keterangan bahawa P & P tersebut delinkuen atau cuai dalam menjalankan penjualan hospital tersebut (lihat perenggan 26).

(4) Pemohon tidak mematuhi ujian bagi menunjukkan bahawa penggulungan sukarela adalah lebih baik kepada pemiutang-pemiutang daripada penggulungan wajib oleh perintah mahkamah. Tiada keadaan-keadaan istimewa ditunjukkan yang membolehkan inferens sedemikian (lihat perenggan 28).

(5) Permohonan pempetisyen untuk melantik likuidator sementara adalah tidak berdasarkan bona fide di atas s 231 Akta, tetapi difailkan untuk memastikan perlantikan likuidator sementara atas pilihan pempetisyen, bukannya atas pilihan pemohon. Pempetisyen tidak menunjukkan bahawa aset-aset syarikat tersebut tergugat atau bahawa pemiutang-pemiutang syarikat akan kerugian. Oleh itu, tiada asas bagi permohonan ini. Imbangan kemudahan tidak memihak kepada perlantikan likuidator sementara (lihat perenggan 31).]

Notes

For cases on dissolution, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1057–1058.

For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1205–1243.

For cases on provisional liquidator, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1490–1494.

Cases referred to

Akai Australia Pty Ltd, Re (1978) 3 ACLR 353 (refd)

Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors [1998] 1 MLJ 99, CA (refd)

North Western Fruitgrowers Pty Ltd, Re [1965] VR 306 (refd)

Legislation referred to

Companies Act 1961 [AU] s 276
Companies Act 1965 ss 231, 255, 276

Sivagurunathan (Anoop & See) for the petitioner.
Logan Sabapathy (PY Liew with him) (Logan Sabapathy & Co) for the respondent.

Nallini Pathmanathan JC:

DECISION

[1] This is an application by Global Health Capital Sdn Bhd ('the applicant') pursuant to s 276 of the Companies Act 1965 ('the Act') for leave to resolve for a creditors' voluntary winding up of the respondent company (additionally the applicant also seeks to appoint provisional liquidators from Messrs Price Waterhouse Coopers). Such an application is necessary as the Hasjuara Sdn Bhd, the petitioner filed a petition to wind up Bio Science Capital Sdn Bhd, the respondent company ('the respondent') on 3 August 2009. The hearing of the petition is fixed on 22 October 2009. Section 276 of the Act provides as follows:

> Where a petition has been presented to the Court to wind up a company on the ground that it is unable to pay its debts the company shall not without the leave of the Court resolve that it be wound up voluntarily.

SALIENT FACTS

[2] The business activity of the respondent is the construction, development and intended operation of a specialist neurology and cardiac hospital known as 'Asian Neuro & Cardiac Centre' ('the hospital'). The hospital has been built on land held under Geran 40268, Lot 2, Town of Saujana. The respondent had to procure banking facilities to finance the construction of the hospital which it did from Affin Bank Bhd ('bank');

[3] The petitioner was the main contractor for the construction and its claim of a debt owed by the respondent stems from work done by it. Apart from the petitioner, numerous other contractors, consultants, professional and non-professional staff were involved in the construction and development of the hospital.

[4] The banking facilities were found to be insufficient and after the economic downturn there were difficulties in securing additional facilities.

A The applicant, which is the main shareholder of the respondent (as well as a creditor) explored various options including the sale of the hospital to realise sufficient amounts to repay the bank and its general creditors.

[5] In late May 2009, Sime Darby Healthcare ('Sime Darby') had
B discussions with the respondent and also made site visits thereby indicating an interest in purchasing the hospital. Sime Darby issued a confidentiality letter to the respondent to facilitate further due diligence. The confidentiality letter is signed by the chief executive officer of the Healthcare Group of Sime Darby. The applicant has also exhibited a document marked with the heading
C 'draft' and intended to carry Sime Darby Healthcare Sdn Bhd's letterhead, which is called a letter of intent. In its affidavit in support of this application the applicant has described it as a 'draft letter of intent with an indicative offer price of RM150,000,000 ...'. It is not clear from a perusal of the document that it was indeed issued by Sime Darby as there is no signature on it, nor
D anything else to indicate that it emanated from Sime Darby.

[6] According to the applicant, Sime Darby commenced their due diligence on the hospital on 20 July 2009 but this was interrupted on 21 July 2009 when the bank appointed Tee Guan Pian as receiver and manager of the
E respondent company for outstanding sums of approximately RM93,000,000.

[7] The respondent had a meeting with the bank on 22 July 2009 and informed the bank of Sime Darby's interest in acquiring the hospital and the
F disruption of their due diligence. The receiver and manager, nonetheless proceeded with an open tender exercise for the sale of the hospital to the highest bidder of the hospital and the land. In short the receiver and manager did not accede to the respondent's request that the open tender exercise be held in abeyance for a period of a month to enable Sime Darby's interest in
G the sale to be explored.

[8] Messrs Rahim & Co have indicated that the market value of the land (under the limiting conditions expressed in the report, which are not available) is in the region of RM205,000,000.

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[9] The applicant's pivotal reason for filing this application, and its main grievance is that as neither the bank nor the receiver and manager have agreed to or responded to its requests, the indicative offer from Sime Darby will not be considered by the receiver and manager in view of the open tender (it is
I relevant to note from the documents relating to the open tender that offers closed as of 24 August 2009).

[10] The applicant states that an open tender would severely affect the purchase price of the hospital. This is a bare assertion. The applicant also

states that it would be in the interests of the general body of creditors as a whole for the hospital to be realised at the best possible price, an undisputable fact.

[11] Bearing in mind the interests of the creditors as a whole, the applicant maintains that it was of the view that a provisional liquidator be appointed to protect their interests. Before such a step could be taken however, the petitioner filed its petition on 3 August 2009 and served it on 21 August 2009.

[12] As such the applicant files this application seeking leave to resolve that it be wound up voluntarily and thereby allow for the appointment of a provisional liquidator (which falls under s 255 of the Act in relation to voluntary winding up).

[13] The petitioner strongly objects to this application maintaining, inter alia, that the applicant has put forward no basis for suggesting that a public tender will realise a lesser sum than that offered by Sime Darby; nor how the company's asset, the hospital will be more effectively realised by a voluntary winding up as opposed to a winding up by the court. The petitioner maintains that a court appointed liquidator will be in just as good a position to realise its assets as one appointed in voluntary liquidation.

[14] Additionally the applicant urges the court to consider that the applicant is the main shareholder of the respondent, that the applicant and the respondent have common directors and that accordingly at all material times the applicant had control over the affairs of the respondent.

[15] Notwithstanding this, and despite being aware of the financial status of the company no effort was taken to call for a voluntary winding up until now.

[16] Further the petitioner states that it was the company's main creditor until December 2008 when the applicant emerged as a major creditor claiming to hold approximately 52% of the total debt owing by the company. The petitioner maintains that this claim is flawed and does not reflect an accurate picture as some of the debts could not have been incurred at the dates claimed. Moreover, the petitioner contends that by claiming to be the substantial creditor with advances amounting to 52% of the total amounts owing, the applicant would be able to control the creditors' meting and influence the committee of inspection and thereby the liquidator.

[17] The petitioner in response has filed an application to appoint a provisional liquidator of its own choice.

[18] It is in the context of this factual matrix that the applicant's application for leave to resolve to voluntarily wind up the respondent and thereby appoint a provisional liquidator under s 255 of the Act is premised, as is the petitioner's subsequent application to appoint a provisional liquidator under s 231 of the Act.

THE LAW

[19] There are no reported decisions on s 276 of the Act in Malaysia. The learned author of *McPherson's Law of Company Liquidation* states as follows:

> There are at least three statutory restrictions on voluntary winding up. The first restriction is when an application has been filed with the court for the winding up of a company in insolvency. In this case, leave of the court is necessary before the company can resolve to wind up voluntarily, the object apparently being to prevent the company from arbitrarily imposing on the applicant the burden of satisfying the court that the voluntary winding up cannot be carried on with due regard to the interests of the creditors. Although such leave may be given retrospectively, *the onus of satisfying the court lies on the applicant and can seldom be discharged, because the applicant must establish that there are special circumstances that make it preferable that the company be wound up voluntarily rather than compulsorily*. The fact that compulsory winding up will be more expensive will not alone lead courts to grant retrospective leave ... (Emphasis added.)

[20] This position in law is borne out by the case law submitted by both learned counsel for the applicant as well as for the petitioner. In *Re Akai Australia Pty Ltd* (1978) 3 ACLR 353 Powell J in dealing with the equivalent provision in s 276 of the Australian Companies Act 1961 stated as follows:

> ... *having regard to the provisions of s 276 of the Companies Act 1961, the company bore the onus of establishing that, in the circumstances which now exist, it is preferable that the company be wound up voluntarily rather than that the company be wound up compulsorily pursuant to an order of this court*. In the light of the judgments of Adam J in *Re North Western Fruitgrowers Pty Ltd* [1965] VR 306 of Gowans J in *Re Horsham Kyosan Engineering Co Ltd* [1972] VR 403 and, more recently of Jacobs J in *Re South Australian Air Conditioning Centre Pty Ltd* (1977) 2 ACLR 539, the onus thus accepted by Mr Maconachie was, so it seems to me, properly accepted by him ...

[21] And in *Re North Western Fruitgrowers Pty Ltd* [1965] VR 306 Adam J examined s 276 in some depth before holding as follows:

> ... It seems reasonable to assume, from the presence of s 276 in the Act, that a company which has not, prior to the presentation of a creditor's petition, passed a resolution for a voluntary winding up, was to be in the position of a suppliant required to satisfy the court that it should, notwithstanding a pending petition, be

permitted to wind up voluntarily, and so be put in the favourable position created by s 221(1)(d) to oppose the creditor's petition. After all, it is for the company to obtain the necessary leave from the court. Why should it be granted such leave unless it can persuade the court that there is good reason for granting it, that is, that in all the circumstances a voluntary liquidation has advantages over a winding up by the court?

[22] Although this case dealt with a members voluntary winding up rather than a creditors' voluntary winding up, the principle appears to be the same, that the onus is on the company to establish special circumstances showing that proceeding by way of a voluntary liquidation is preferable to a compulsory winding up by the court.

[23] The foregoing being the test, it follows that it is incumbent on the applicant to demonstrate that a voluntary winding up would be preferable and to the interests of the general body of creditors, in comparison to a compulsory winding up by the court. What has the applicant shown in support of its application? In essence the applicant maintains that if it is allowed to resolve to wind up voluntarily it can proceed under s 255 to appoint a provisional liquidator from the firm of Price Waterhouse Coopers to explore the possibility of a sale of the hospital with Sime Darby. In support of its case, the applicant relies on the confidentiality letter described above as well as the letter of intent. As stated in the context of the facts, the latter does not, on inspection, clearly appear to emanate from Sime Darby. It appears to be a draft document which it was anticipated that Sime Darby would execute. If indeed such a document was executed by Sime Darby, it does not appear to have been exhibited in this application. As such, the document warranting consideration is the confidentiality letter, which in itself amounts to nothing more than an indication of interest from Sime Darby.

[24] As against this, the factual matrix reveals that the receivers and managers have progressed quite far in the course of their open tender for the sale of the hospital. The applicant has made an assertion to the effect that such a sale by open tender (which commenced in early August 2009) 'could severely affect the purchase price of the hospital'. However no other evidence or fact is produced in support of this statement. As such it amounts to a bare assertion.

[25] Moreover, as the hospital is being sold by an open public tender, it was at all times open to Sime Darby to put in a bid. The fact that Sime Darby was at all times, by virtue of the public tender, at liberty to put in a bid in the region of RM150m or otherwise has not been addressed.

A **[26]** The further oblique suggestion is that if leave is granted and a liquidator from Price Waterhouse Coopers appointed as provisional liquidator, a better price for the hospital will be procured. However again, there is nothing substantive to support this contention. A liquidator from the firm of the applicant's choice does not ensure that a better price will be
B procured. The applicant maintains that the failure of the bank and the receiver and manager to accede to their request for a moratorium period to enable Sime Darby to explore the purchase of the hospital at an indicative price of RM150m, evidences their lack of interest in procuring the best price. With respect, it does not follow that simply because the receiver and manager
C does not accede to the wishes or requests of the main shareholder who is also a common director of the respondent, that the receiver is not cognisant of his duty to realise the hospital at a good price. There is no evidence to suggest that the receiver is being delinquent or negligent in conducting the sale of the
D hospital.

[27] In *Re Akai Australia Pty Ltd* the applicant seeking leave offered evidence that the particular advantage which would flow to the creditors was that whereas in a compulsory winding up a liquidator more likely than not
E would submit the whole of the company's stock for sale at public auction, in the case of a voluntary winding up, a liquidator would be less likely to do so, and would more likely to seek to release the stock progressively in an endeavour to obtain, overall, a more advantageous price for the stock. Powell J considered this contention put forth by an experienced solicitor and
F concluded that the evidence did not establish the contention that a progressive sale of stock in voluntary liquidation would produce a better price. The judge went on to hold that even if such a course were adopted and a better price obtained it did not necessarily follow that would in fact be to the advantage of the creditors; nor that the creditors would regard it as being
G so. He concluded that he could not be satisfied that it was more probable than not that a voluntary winding up would be more advantageous to the creditors than would be a compulsory winding up.

[28] Here too, there is no substantive evidence or factual matrix that
H warrants a conclusion that a voluntary winding up would be more advantageous to the creditors than a compulsory winding up. When stripped to its bare essence the applicant seeks to appoint a provisional liquidator of its choice as a means of ensuring a better price for the realisation of the hospital. However there is no basis for the assertion that such an appointment
I would ensure or guarantee a better price. Significantly there is nothing stopping Sime Darby from participating in the open tender if indeed it is interested in purchasing the hospital. Given these circumstances, I conclude that the applicant has not met the test of showing that a voluntary winding up would serve the creditors better than a compulsory winding up by order

of court. No special circumstances have been demonstrated warranting such an inference. As such, I am constrained to dismiss the application under s 276 for leave to resolve to wind up the respondent voluntarily with costs.

[29] The petitioner raised a preliminary objection to the effect that the applicant was bound to file a notice of intention to appear prior to being heard on its application. On the authority of *Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors* [1998] 1 MLJ 99, I concluded that this objection was without merit.

[30] I now turn to the petitioner's application to appoint a provisional liquidator, which application was filed as a consequence of the applicant's application under s 276 coupled with the appointment of a provisional liquidator. It appears to this court that this application was not premised bona fide on s 231 of the Act, but was filed with a view to ensuring that a provisional liquidator of the petitioner's choice, rather than that of the applicant was appointed. In its application the petitioner adopts the position taken by the applicant in fearing for the price at which the hospital may be realised under the receiver conducted sale but prays instead for a provisional liquidator of its choice to be appointed.

[31] In the instant application by the petitioner, it has not been demonstrated that the assets of the company are in jeopardy. It has not been shown that the creditors of the company will be ultimately disadvantaged. In considering this application the court is bound to examine the degree of urgency, the need established by the petitioner and the balance of convenience. Given the timing of the petitioner's application and the basis for the petitioner's application which is fundamentally premised on the same factual matrix as the applicant, save that it wishes a provisional liquidator of its choice to be appointed, it follows that there are no good grounds for this application. The balance of convenience does not favour the appointment of a provisional liquidator. As such the petitioner's application is also dismissed with costs.

The applicant's and the petitioner's applications dismissed with costs.

Reported by Kanesh Sundrum